

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VON CEDRIC LARRY,

Defendant-Appellant.

UNPUBLISHED

December 22, 2011

No. 300370

Oakland Circuit Court

LC No. 2007-216890 - FC

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his 99 to 145 year sentence for solicitation to commit murder, MCL 750.157b(2). We affirm.

Defendant contends that the trial court erred in imposing his sentence because it was disproportionate and amounted to cruel and unusual punishment under the Eighth Amendment of the United States Constitution. We disagree.

Defendant's conviction arises out of his conduct while in jail awaiting his trial for criminal sexual conduct involving rape of a minor. Defendant solicited his fellow cellmates to murder his rape victim, a 15 year old mentally impaired woman. After a jury trial conviction, defendant was initially sentenced to a minimum of 99 years imprisonment. Defendant appealed his conviction as of right, and this Court affirmed his conviction, stating that there were substantial and compelling reasons that justified departing from defendant's recommended guidelines range, as a fourth habitual offender, MCL 769.12, of 225 to 750 months. *People v Larry*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2009 (Docket No. 283364) (unpub op at 9, 11). This Court did, however, vacate defendant's sentence and remand the case to the trial court on the basis that the trial court failed to state, with particularity, why the extent of the departure (36.5 years) was justified. *Larry*, unpub op at 12. Basing its opinion on *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008), which was decided after the original sentencing, this Court suggested that the trial court could compare defendant to a hypothetical defendant whose recommended sentence was comparable to the departure sentence, or consider the location of where an upward departure would fall on the sentencing guidelines grid. *Larry*, unpub op at 12. At resentencing, the trial court sentenced defendant to 99 to 145 years' imprisonment, after explaining the particular reasons that led to the conclusion that this sentence was warranted.

Defendant's objection to the extent of the sentence departure is reviewed under an abuse of discretion standard. *Smith*, 482 Mich at 300. An abuse of discretion is found "when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The trial court, with the horrific facts at hand, did not abuse its discretion when imposing defendant's sentence. At resentencing, the trial court specifically articulated its reasoning behind each elevation in defendant's sentencing range. First, defendant's conviction for solicitation to commit murder resulted in him being sentenced according to the Class A sentencing guidelines grid for crimes against a person, MCL 777.62, enhanced by defendant's fourth habitual offender status, MCL 777.21(3)(c). Defendant's prior record variable score (PRV) was 70 points, and his offense variable score (OV) was 125 points. The trial court noted that defendant's OV score actually exceeded the maximum level on the grid, as each level had a range of 20 points and the highest level began at 100 points. Therefore, according to where defendant's OV score would place him on a theoretical part of the grid, the trial court stated that defendant's recommended sentence range would be 270 to 900 months/life. To support such a decision, the trial court mentioned *People v Cline*, 276 Mich App 634, 648; 741 NW2d 563 (2007), which stated that since the defendant's OV score was 20 points in excess of the highest OV level on that defendant's sentencing guidelines grid, it was reasonable to move the defendant to the next highest level. *Id.* Hence, as the trial court in this case provided specific reasoning and sufficient legal support justifying why defendant's sentencing range was more appropriately moved to the 270 to 900 months/life range, it did not abuse its discretion.

The trial court also stated specifically that the elevation to the theoretical 315 to 1050 months/life cell was justified when considering defendant's behavior while incarcerated. The trial judge stated that defendant had received three misconducts since his original conviction and sentence for solicitation to commit murder, and specified that the misconducts were theft/possession of stolen property, insolence, and creating a disturbance. The trial judge stated that these uncharged incidents were the basis upon which he was elevating defendant's sentence range to this next theoretical cell. This was not an abuse of discretion. As this Court held in *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995), misconduct while incarcerated that occurred after conviction and original sentencing is a sufficient basis to depart from the sentencing guideline range and does not constitute an abuse of discretion. See also *People v Hicks*, 259 Mich App 518, 535-536; 675 NW2d 599 (2003) (relating to prison misconducts even before conviction for the crime at issue).

Finally, the trial court stated that the elevation to the sentencing range of 365 to 1200 months / life, which is where defendant's minimum sentence of 1188 months falls, was justified due to defendant's other 146 misconducts in prison, his escalating criminal behavior, his disregard for public safety, the psychological injury to the family of the victim, his offense variable score exceeding the maximum on the grid, and the fact that he attempted to kill a witness in another pending capital case and undermine the rule of law and obstruct justice. This was not an abuse of discretion, as many of these factors alone would have justified this further elevation. This Court has recognized in the past that psychological injury, when particularly heinous, can justify a departure from the recommended guidelines range. *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001). Planning to murder a 15 year old, mentally impaired young woman after previously raping her certainly qualifies as a particularly heinous

act that justifies this elevation. This Court has also held that a defendant's total disregard for public safety, along with other factors, can provide a sufficient basis to depart from the recommended sentence range. *Watkins*, 209 Mich App at 6. Hence, considering all of these enumerated reasons, the trial court provided sufficient justification to place defendant's sentence in the 365 to 1200 months/life range, and did not abuse its discretion.

The sentence imposed was also proportionate to the offense and the offender. A sentence that is disproportionate to the seriousness of the circumstances surrounding the offense and the offender is an abuse of discretion. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). In this case, while a 36.5 year departure is certainly extensive, it is also proportionate to the offense and offender due to the very specific list articulated by the trial judge. Defendant's misconduct in prison is nothing short of astonishing. While incarcerated for this crime and past crimes, defendant received upwards of 146 misconducts, ranging from sexual misconduct to assaulting staff members, insolence, and destruction and misuse of property. Additionally, after his release from serving a full 15 year sentence for past crimes, only 10 months passed before defendant committed three criminal sexual conduct crimes. Then, while in prison for one of those crimes, he attempted to pay his cellmates to murder the young victim he had brutally raped in his van. Even defendant acknowledges in his appellate brief that "everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *Smith*, 482 Mich at 305. Considering the egregious nature of the crime, defendant's appalling prison record, defendant's off the chart OV score, the psychological impact on the victim, and all of the other factors the trial judge listed, the trial judge's conclusion that the sentence departure was proportionate was not an abuse of discretion.

As for defendant's Eighth Amendment claim, the traditional factors used to judge whether the length of the sentence imposed constitutes cruel and unusual punishment are the gravity of the offense and harshness of the penalty, the sentence imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. *Solem v Helm*, 463 US 277, 292; 103 S Ct 3001; 77 L Ed 2d 637 (1983). For defendant's Eighth Amendment claim to be preserved for appeal, however, it had to have been "raised, addressed, and decided by the lower court." *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defendant's first mention of the Eighth Amendment is in his appeal from his initial sentence to this Court, which was not addressed as this Court vacated the sentence and remanded on alternate grounds. *Larry*, unpub op at 12. Defendant did not raise this issue in the lower court, even after remand at the resentencing. Hence, an unpreserved claim of constitutional error is reviewed only for plain error. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Therefore, in order for defendant's argument to prevail, an error must have occurred, it must be clearly obvious, and it must have affected defendant's substantial rights. *Id.* at 763.

Defendant does not pass the first hurdle, as there is no evidence that an error actually occurred. Defendant's sentence for solicitation to commit murder is not cruel and unusual when compared to sentences imposed for crimes of an even lesser severity. For example, in *Harmelin v Michigan*, 501 US 957, 996; 111 S Ct 2680; 115 L Ed 2d 836 (1991), the United States Supreme Court upheld a life sentence without parole for a conviction of possessing a large quantity of cocaine. Moreover, this Court has upheld a life sentence for first-degree criminal sexual conduct, even though there was no threat to the victim's life. *People v Garrison*, 128

Mich App 640; 341 NW2d 170 (1983). While a mandatory nonparolable life term for a nonviolent felony, when defendant's prior felonies are likewise nonviolent, has been struck down as unconstitutional under the Eighth Amendment, *Solem*, 463 US at 303, defendant in this case did not receive a mandatory life sentence, nor was it nonparolable. While it is true that considering defendant's age, in effect he will not be eligible for parole in his lifetime, this does not alter the fact that the sentence imposed in this case is categorically different than those held to be unconstitutional. Moreover, in *Solem*, the defendant had a string of nonviolent felonies such as third-degree burglary, obtaining money under false pretences, and uttering a "no account" check. *Solem*, 463 US at 280-282. Yet, this case is in stark contrast, as defendant's past crimes include not only three criminal sexual conduct crimes, but also the felony at issue of solicitation for murder.

Furthermore, as previously discussed, the sentence was proportionate to the egregiousness of the offender and the offense, and a proportionate sentence does not constitute cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). As a final attempt to support his claim, defendant argues that many of the factors that led the trial judge to depart from the guidelines range were unrelated to the charged offense. Defendant does not explain, and cites no authority, why this should impact an Eighth Amendment analysis, and numerous cases have upheld sentence departures that depend on factors unrelated to the exact charged offense. See *Watkins*, 209 Mich App at 5; See also *Solem*, 501 US at 280-282. Therefore, it cannot be said that the trial court's imposition of a 99 to 145 year sentence is a plain error under the cruel and unusual analysis of the Eighth Amendment.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause